

JUSTIFICATIONS FOR THE THREE-TIERED JUDICIAL SYSTEM IN AFGHANISTAN: COMPARATIVE PERSPECTIVES ON ISLAMIC JURISPRUDENCE

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INTRODUCTION

Under the Constitution of the Islamic Republic of Afghanistan, no law shall contradict the principles of Islam. Additionally, the Constitution established a system of separation of powers, including three branches: the executive, legislature, and judiciary. The judiciary operates as an independent branch with three tiers. However, this three-tiered structure has been controversial among Islamic scholars who do not recognize any explicit justification for a three-tiered court system under Islamic law and view the three-tiered system as inconsistent with Islam.

This Article argues that sufficiently strong Islamic justifications exist for maintaining a three-tiered judiciary—justifications that overcome the Islamic views that oppose it. Through its discussion and analysis, this Article accounts for the Islamic Fiqh that show three-tiered courts are consistent with Islam. This Fiqh provide strong

support for the view that the Constitution's *Sharia Guarantee Clause* (SGC) and the three-tiered judiciary are consistent with the provision of Islam.

First, to show how three-tiered courts are consistent with Islam, this Article examines the history of the judiciary in Islam itself, including the teachings of the Prophet, his Companions, and Caliphate. Next it looks to Saudi Arabia, a prime example of an Islamic state that adopted and maintains a three-tiered judiciary, highlighting Saudi Arabia's Islamic justifications for this system. Then it discusses contemporary scholars who compare the Holy Quran and Hadiths to articulate justifications for a three-tiered judiciary in Afghanistan. Finally, it recommends that today's Afghan three-tiered judiciary is undoubtedly consistent with the provisions of Islam, and it provides justification for its consistency.

I. TODAY'S CONTROVERSY OVER THE THREE-TIERED JUDICIARY SYSTEM IN AFGHANISTAN

A. *The Opponents of the Three-Tiered Judiciary System*

Opponents of the three-tiered judiciary system in Afghanistan generally maintain that a three-tiered judiciary is inconsistent with provisions of Islam.¹ They maintain the Prophet Mohammad established a single-tiered court in which the Prophet was the final judge for resolving disputes, and his decisions were not reviewable.² Those who oppose the three-tiered system, therefore, view the establishment of a system with courts of appeal as incompatible with the fundamental and historical structure of Islamic justice.³ In fact, some Islamic jurists believe a judiciary should not be an independent organ from the executive branch.⁴ Instead, they view the judiciary is properly placed as part of the executive branch that should derive its power from the caliph (governors of provinces).⁵ The approach of the

1. See generally Ata ur Rehman, Ibrahim Mazlan, & Ibrahim Abu Bakar, *The Concept of Independence of Judiciary in Islam*, 4.2 I.J. BUS. & SOC. SCI. 67, 68 (2013).

2. See *id.* at 67.

3. See *id.* at 68.

4. *Id.*

5. See *id.*

Taliban government was consistent with this view, as it also opposed the three-tiered judiciary system on the same ground.⁶

The Taliban government, Islamic fundamentalists and learners of Islamic Knowledge Movement, ruled Afghanistan from 1996 until 2001, occupying a period of Afghanistan's long civil war.⁷ The Taliban was a Mujahideen faction created during both the Soviet Union's occupation and Afghanistan's internal fighting.⁸ During its reign, the Taliban had a strong hold on many Afghan territories, including the capital city of Kabul.⁹

Under Taliban rule there existed no constitution, rule of law, or independent judiciary.¹⁰ Without an independent judiciary, many authorities implemented Taliban's interpretation of Shari'a law and traditional Tribal Codes of Justice.¹¹ Judicial decisions, under the Taliban's system, were based on "the will and advice of the *Amir Al-Mu'minin*, who is believed to guide based on Sunnah."¹² The Taliban introduced a conservative interpretation of Islam to the judiciary.¹³ Afghan Courts enforced several harsh punishments in the name of Shari'a law, such as Hudud,¹⁴ the stoning of adulterers, and the amputation of the thieves.¹⁵ The Taliban believed these laws protected

6. Minakashi Das & Ratan Tata, *Taliban's War on Women: Live Experiences of Afghan Women in Transit on Ethnicity and Their Identity*, ASIA RES. CTR. 24 (2006), <http://eprints.lse.ac.uk/25198/1/ARCWP13MinakishiDasApr2006.pdf>.

7. Laura Hayes, Borgna Brunner & Beth Rowen, *Who Are the Taliban?* INFOPLEASE, <http://www.infoplease.com/spot/taliban.html> (last visited Jan. 18, 2018).

8. Abderrahim Amghar, *History of the Taliban*, NAZARETH COLLEGE, <http://www-pub.naz.edu/~aamghar6/History%20of%20the%20Taliban.htm>.

9. *Id.*

10. Das & Tata, *supra* note 6, at 24.

11. *Id.*

12. Chapter 3: Legal System in Afghanistan, 71, http://shodhganga.inflibnet.ac.in/bitstream/10603/18418/9/09_chapter%203.pdf [hereinafter Legal System in Afghanistan].

13. *Id.*

14. *Hudud Definition*, THE FREE DICTIONARY BY FARLEX, <https://www.thefreedictionary.com/hudud>. Hudud is Arabic word, also translated hadud, hudood: singular had. Literally it means "limit" or "restriction" an Islamic term refers to punishment which under Islamic Law (Shari'a) are mandated and fixed by Allah (God).

15. Legal System in Afghanistan, *supra* note 12, at 71.

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the safety of the people and their property.¹⁶ Consistent with this view, judges and executives often carried out “lashings, stoning, amputations, and executions in public places such as squares, schools, or sports grounds.”¹⁷ Taliban fighters would ensure a full audience by driving through neighborhoods announcing punishments on loudspeakers.¹⁸ Those guilty of theft could suffer the loss of a hand depending upon the severity of the offense.¹⁹ Amputees regularly fainted as fighters marched the body parts through the audience before burial.²⁰ This brutality was how the Taliban pursued its inhumane version of justice during its reign.

The Taliban regime controlled thirteen appellate courts throughout several provinces.²¹ Despite the fact that the Ministry of Justice and the Supreme Court were located in Kabul, the most powerful institution was the Kandahar Islamic Supreme Court.²² It appointed judges called *qazis* and provided trainings and dialogs on Shari’a law twice per year.²³

The international community took note of the Taliban’s violent sense of justice.²⁴ In response to the attacks on September 11, 2001, the United States military and Afghan opposition forces sought to overthrow the Taliban in December 2001.²⁵

16. *Id.*

17. Humayun Hadid & Johannes Dell, *Summary Amputations: Taliban justice in Afghanistan*, BBC NEWS (Apr. 27, 2013), <http://www.bbc.com/news/world-asia-22311036>.

18. *Id.*

19. *Id.*

20. *Id.*

21. Jami Forbes, *The Significance of Taliban Shari’a Courts in Afghanistan*, 6 CCT SENTINEL 13, 15 (2013), <https://www.ctc.usma.edu/posts/the-significance-of-taliban-sharia-courts-in-afghanistan>.

22. *Id.*

23. *Id.*

24. *See, e.g., id.*

25. Dominic Tierney, *The Twenty Years’ War*, THE ATLANTIC (Aug. 23, 2016), <https://www.theatlantic.com/international/archive/2016/08/twenty-years-war/496736/>.

B. After the Taliban: The 2004 Constitution

After opposition forces dismantled the Taliban government, the Afghan people continued to support Taliban-inspired judicial principles.²⁶ Most importantly, in 2004, the Afghan government implemented a new constitution to establish the new government in order to prevent the injustices and shortcomings of the past.²⁷ Notably, Article 3 of this Constitution contains a clause, which explicitly mandates, “No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan.”²⁸ In addition, Article 130 directs the court to follow Hanafi jurisprudence where there is no guiding provision of the Constitution:

In cases under consideration, the courts shall apply provisions of this Constitution as well as other laws. If there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of Hanafi jurisprudence, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner.²⁹

The Constitution divides the government into three main branches: the executive,³⁰ legislative,³¹ and judiciary.³² The judiciary is comprised of one Supreme Court, Courts of Appeal, and Primary (trial) Courts.³³ The Constitution gives the Supreme Court authority to review laws for constitutionality and consistency with Islam.³⁴ Specifically, Article 121 states, “[T]he Supreme Court shall review the laws, legislative decrees, international treaties, and international covenants for their compliance with the Constitution and [Islamic principles].”³⁵

26. *Id.*

27. *See* DA AFGHANISTAN ASSASI QANOON [CONSTITUTION], pmb1.

28. *Id.* art. 3.

29. *Id.* art. 130.

30. *Id.* art. 60.

31. *Id.* art. 81.

32. *Id.* art. 116.

33. *Id.*

34. *Id.* art. 121.

35. *Id.*

Some Islamic scholars have criticized these ideals, claiming they create a contradiction between the judiciary and Islamic law.³⁶ On one hand, these scholars argue citizens must comply with the law.³⁷ On the other hand, the Constitution requires compliance with Islam.³⁸ To find a contradiction between these provisions, however, one must follow only absolute interpretations of Islamic provisions.³⁹ Under this absolute interpretation, a three-tiered judiciary might appear to conflict with Islam;⁴⁰ however, this Article argues, under the Islamic Fiqh (jurisprudence), neither these constitutional provisions nor a three-tiered judicial system contradict the laws of Islam. The Islamic Fiqh shows strong support for finding consistency between the Constitution, the Fiqh, and Islamic provisions, as well as a strong judicial system comprised of three tiers.⁴¹

C. The Structure of the Three-Tiered System in Afghanistan Compared with Common Law Models

There are five major types of legal systems in the world: (1) civil law; (2) common law; (3) customary law; (4) religious legal systems, including Islamic law; and (5) mixed law or plural systems.⁴² For example, Saudi Arabia has an Islamic law system⁴³ and Afghanistan has a mixed legal system of civil, customary, and Islamic law.⁴⁴ In contrast, countries like the United States, Canada, England, Australia, and India follow somewhat varied versions of common law systems

36. See generally Rehman, *supra* note 1, at 72

37. *Id.*

38. DA AFGHANISTAN ASSASI QANOON [CONSTITUTION], art. 3.

39. NASIR BIN MOHAMMAD ALGHAMIDY, ALAIKHTISAS ALQADAYIY FI ALFQH AL'ISLAM [JURISDICTION IN THE ISLAMIC JURISPRUDENCE] 151 (2000) (on file with author).

40. *Id.*

41. *Id.*

42. *Legal Systems of the World*, CHARTSBIN, <http://chartsbin.com/view/aq2> (last visited May 17, 2017).

43. *Id.*

44. *The World Factbook*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html> (last visited May 17, 2017).

where courts make primary law through their judicial opinions that build, shape, and correct precedent.⁴⁵

In countries like the United States and other primarily civil law or mixed jurisdictions like Afghanistan, important differences in the role of courts, court structure, and court procedures distinguish each system.⁴⁶ Understanding this foundation is critical to understanding what a three-tiered judiciary means in the context of Afghanistan. Not only is it important for understanding the role of courts but also for understanding the way that the system comports with Islam.

The Afghan judicial system is comprised of three tiers.⁴⁷ According to Article 116 of the Constitution, the judiciary is an independent branch of the government.⁴⁸ The same Article establishes that the judiciary will consist of one Supreme Court, the Courts of Appeal, and the Primary Courts.⁴⁹

The Afghanistan Attorney's Office—a part of the executive branch—plays the role of investigator.⁵⁰ According to Article 101 of the newest Criminal Procedural Code (CPC), the primary courts have thirty days to investigate legal documents, while the courts of appeal have sixty days for re-investigation.⁵¹ After receiving legal documents from the prosecutor's office, the chief judge of the primary court appoints a judge to investigate and prepare the report of the document.⁵² The appointed judge notes the jurisdiction of the court, the attribution of a crime to a suspect, the description of the crime, probable cause, social conditions, health and other records of accused, evidence, and the proof of the accusation.⁵³ The judiciary committee then hears the report of the judge and issues a warrant for the jurisdiction or lack of

45. *See generally Civil Law v. Common Law*, DIFFEN, http://www.diffen.com/difference/Civil_Law_vs_Common_Law (last visited Mar. 6, 2017).

46. *See generally id.*

47. *Judicial System*, THE SUPREME COURT ISLAMIC REPUBLIC OF AFG., <http://supremecourt.gov.af/en/page/620> (last visited Oct. 22, 2017).

48. DA AFGHANISTAN ASSASI QANOON [CONSTITUTION], art. 116.

49. *Id.*

50. *Id.* art. 134.

51. AFGHANISTAN CRIMINAL PROCEDURE CODE [CPC] art. 101.

52. *Id.*

53. *See id.* art. 202 § 2.

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jurisdiction.⁵⁴ Next, the committee issues a warrant to the prosecution office to complete the investigation because the lack of evidence sometimes warrants not hearing the case.⁵⁵ If there is no evidence against the suspect, the court can issue a warrant about non-hearing of a case.⁵⁶

After the evidence and documents are submitted to the judiciary committee, the committee announces the final decision of a case, which should be attended by the prosecutor and defense lawyers of the suspect.⁵⁷ If both parties are not satisfied with lower court decision, they have the right to appeal to the highest court.⁵⁸ Under Article 259 of the new CPC, when the appellate court accepts the appeals documents, the judge who is in charge of *Dewan*⁵⁹ appoints a judge to look over the document and prepare a report for the judiciary committee.⁶⁰

Under Article 204, the Afghan appeals court has the same authority of reinvestigation as the primary court.⁶¹ For example, the appellate court may rehear the entirety of the legal process.⁶² Similarly, the courts of appeal may rehear and litigate the decisions of all lower courts.⁶³ The appellate courts can correct, amend, reverse, vacate, and approve the decisions of lower courts.⁶⁴ Moreover, if the judge of an appeals court understands the evidence and information of the case is

54. *Id.*

55. *See id.* art. 202 § 4.

56. *Id.*

57. *See id.* art. 212 §1.

58. *Id.*

59. A central finance department, chief administrative office, or regional governing body in Islamic societies. *Dewan definition*, GOOGLE, <https://www.google.com/search?q=Dictionary#dobs=dewan> (last visited Jan. 19, 2018).

60. CPC, *supra* note 51, art. 259.

61. LAW ON ORGANIZATION AND JURISDICTION OF JUDICIARY OF ISLAMIC REPUBLIC OF AFGHANISTAN [LAW ON ORGANIZATION AND JURISDICTION OF JUDICIARY] art. 33 (trans. By Checchi/Afghanistan Rule of Law Project (AROLP)).

62. *Id.*

63. *Id.*

64. *Id.*

already completed, the judge can issue the decision about the case without rehearing the facts.⁶⁵

Afghanistan's system is quite different from typical common law systems where judges make rulings, serve as referees for the parties (not as investigators), and create and influence precedent by their opinions.⁶⁶ In most common law legal systems, cases generally go to the trial court where juries have a critical role in determining the facts.⁶⁷ If the losing party is not satisfied with the trial court's judgment, it may seek review by the appellate court.⁶⁸ In common law systems, appellate courts traditionally review the existing trial court record for mistakes of law or erroneous applications of the law to the facts in evidence.⁶⁹ For example, common law appellate courts do not take new evidence, and they do not rehear statements or make findings of fact.⁷⁰ Therefore, when there is sufficient evidence to support the trial court's judgment, common law courts of appeal will not reverse the decision unless it finds that the trial court made an error of law.⁷¹ Thus, a party typically will not appeal a case unless she reasonably believes that she can persuade the appellate judges to rule differently based on evidence entered into the record at trial.⁷²

In conclusion, appellate judges in Afghanistan rehear statements and reinvestigate and appraise the evidence. A judge appointed by the head of the *Dewan* has the responsibility to look over the document and prepare a report for the judiciary committee. In contrast, appellate courts in common law tradition do not question factual evidence decided by trial courts.

65. See CPC, *supra* note 51, art. 263.

66. *Id.*

67. See *The U.S legal system*, FINDLAW, <http://corporate.findlaw.com/litigation-disputes/the-u-s-legal-system.html>, (last visited Mar. 6, 2017).

68. *Id.*

69. *Id.*

70. See *id.*

71. *Id.*

72. *Id.*

*D. The Strengths and Weaknesses of Three-Tiered
Judiciary System from the Islamic Perspective*

Understanding the debate in Afghanistan requires an understanding of the foundational arguments supporting and rejecting the three-tiered judiciary system employed in Islamic countries. The scholarship on judicial structure emphasizes that three-tiered judiciary system like these have both strengths and weaknesses.⁷³ This section reviews this scholarship to provide background for the analysis this Article later presents.

Islamic scholars have found no explicit justification for a three-tiered court system or an explicit statement confirming its consistency with Shari'a rules.⁷⁴ As such, some scholars argue that a three-tiered court system is inconsistent with Shari'a.⁷⁵ However, other scholars and university professors have searched for both explicit and implicit justifications for the three-tiered court system by looking for guidance from the Holy Quran, the Hadith, and Fiqh.⁷⁶

Islamic justification for the three-tiered judicial system stems from all aspects of the Prophet's life, and from the provisions that he delivered to the society through the Hadith. The principles according to the Hadith, which are narrated by Imam Al-Nawawi in his book, *Riyadh As-Salihin*, indicate the Prophet said, "If anyone introduces in our matter something which does not belong to it, [it] will be rejected."⁷⁷ Therefore, the *Ulama* (jurists) require justification for all new matters.⁷⁸ Sometimes this reason is clearly delivered to believers

73. See generally Barnett R. Rubin, *Saving Afghanistan*, 86 FOREIGN AFF. 57 (2007); Charles Cameron & Lewis Kornhauser, *Decision Rules in a Judicial Hierarchy*, 161 J. INSTITUTIONAL & THEORETICAL ECON. 264 (2005); Bernd Schünemann, *The Role of the Victim Within the Criminal Justice System: A Three-Tiered Concept*, 3 BUFF. CRIM. L. REV. 33 (1999); Lee Epstein, Karen O'Connor & Diana Grub, *Middle East in LEGAL TRADITIONS AND SYSTEMS: AN INTERNATIONAL HANDBOOK* 220–38 (Alan N. Katz ed., 1986).

74. ALGHAMIDY, *supra* note 39, at 151–54.

75. *Id.*

76. *Id.*

77. *Riyadh as-Salihin* 169:1.

78. See MUHAMMAD QASIM ZAMAN, *THE ULAMA IN CONTEMPORARY ISLAM: CUSTODIAN OF CHANGE* 39–52 (2010).

by the Prophet, but sometimes it is not clearly delivered.⁷⁹ Thus, the Ulama must analogize and infer the reason from the Quran and Hadith.

A prominent professor of the Shari'a school of the University of UMM Al Qura, Nasir bin Mohammad Alghamidy, observed high courts are particularly valuable because they supervise lower courts and check decisions for accuracy and consistency with procedural rules.⁸⁰ Alghamidy's book, *Alaikhtisas alqadayiy fi alfqh al'iislami*, emphasizes the highest courts generally have a greater capacity to allocate more time and effort than lower courts for accurate legal analysis of complicated cases.⁸¹ While trial courts can handle simple cases, a reviewing court must often consider more complex cases involving difficult issues of law.⁸² Alghamidy also points out a three-tiered system encourages lower judges to search for the right answer and to put more effort into examining evidence because their work will eventually be reviewed.⁸³ Alghamidy also identifies that review in higher courts allows judges to improve findings and decisions in a lower court; such an opportunity makes a just ruling more achievable.⁸⁴ Again, this system differs from the three-tiered system in common law countries, like the United States, where parties cannot introduce new evidence on appeal.⁸⁵

Similarly, Monir Naief, another reputable scholar, emphasizes that a three-tiered court system inspires judges to clearly state their rationales, which ensures cases are justly decided and lessens the likelihood of reversal.⁸⁶ Naief also notes the three-tiered judiciary

79. See AUTHORITY AND POLITICAL CULTURE IN SHI'ISM 146–55 (Said Amir Arjomand ed., 1988).

80. ALGHAMIDY, *supra* note 39, at 157.

81. *Id.*

82. *Id.*

83. *Id.* at 158.

84. See *id.* at 158–59.

85. *How Courts Work*, AM. BAR ASS'N DIV. PUB. EDUC., https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/appeals.html (last visited Jan. 18, 2018).

86. Monir bin Naief Al Shaibani, *Taeaddud darajat Alttaqadi fi alfaqih al'iislami walqanuni* [Multiple Degrees of Litigation in Islamic and Legal Jurisprudence], NAIF ARAB SECURITY SCI. 82 (2002), <http://www.al-eman.com/index.htm> (once on main page, search for title of article in query box to the right) [hereinafter NAIEF].

system enhances citizens' trust in the judicial branch by providing review by a higher, more experienced court.⁸⁷

However, the three-tiered court system also has weaknesses. First, a three-tiered system burdens the state with more expenses and human resources.⁸⁸ Second, the three-tiered court system delays dispute resolution.⁸⁹ Third, an appeal to the appellate or highest court raises doubt about the ability of trial judges, which conflicts with the fundamental Fiqh principle that trial court judge's decisions should not be doubted.⁹⁰ Similarly, some posit that requesting review of a case violates the principle of *Hujjat Alahkam* (authenticity provision), which states a judicial decision shall not be remanded or ignored if it was correctly issued.⁹¹ In addition, appeals may only benefit those who are financially able to pursue the dispute in a higher court.⁹²

In conclusion, the three-tiered system has strengths and weaknesses. While the three-tiered system uses more human resource and delays the resolution of disputes, it best implements justice and serves the weak and deserved person.

II. DEBATES OVER THE HISTORY OF THE JUDICIARY AND THE REVIEWABILITY OF JUDGES' DECISIONS IN ISLAM

To provide more background on the debate about the three-tiered judicial structure, this section explains the general importance of the judge and the judiciary to the religion of Islam, as well as the historical roots of Islamic courts. This section shows how religious perspective informs discussions of law, justice, and courts in Afghanistan.

History shows that "man cannot live peacefully on this earth unless there is some coercive force to check his aggressive actions. The weak and poor always suffer at the hands of society's strong and rich."⁹³ Therefore, governments make laws to control people and protect the

87. *Id.*

88. *Id.* at 159.

89. *Id.*

90. *Id.* at 82.

91. ALGHAMIDY, *supra* note 39, at 159.

92. *Id.* at 159–60.

93. Rehman, *supra* note 1, at 67.

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rights of everyone.⁹⁴ Likewise, in religious history, Allah (God) sent the law with the Prophet to guide people to God and “establish a system of justice to protect the weak in the society.”⁹⁵ Allah sent all prophets and scriptures to Earth in order to establish justice.⁹⁶ As the Quran says, “We have already sent Our messengers with clear evidences and sent down with the Scripture and the balance that the people may maintain [their affairs] in justice.”⁹⁷ Islam places significant importance on justice and its smooth and impartial administration; justice demands that it should be upheld in all circumstances even if it goes against one’s own self.⁹⁸

*A. Language of the Holy Quran about the
Importance of Judges and Judiciary*

This section further illustrates Islamic perspective on the role of the judge and judiciary. From an Islamic perspective, God created human beings as social creatures.⁹⁹ Humans are unable to dissociate themselves completely from others and live in isolation and seclusion.¹⁰⁰ “Each person has his own particular ideas, qualities, and conduct.”¹⁰¹ Therefore, man is powerless “to live alone and remain in absolute” loneliness, but “is also unable to live in complete harmony with others” because differences will always emerge between individuals and groups.¹⁰² Conflicts and disputes will arise about particular interests, with each person caring only for his own interests.¹⁰³

“The judiciary is the guarantee for a just system of regulations and prevents disarray in social affairs. It requires the establishment of

94. *Id.*

95. *Id.*

96. *Id.*

97. THE HOLY QURAN 57:25 (Sahih International).

98. Rehman, *supra* note 1.

99. Ayatullah Jawadi Amuli, *The Islamic System of Judiciary in the Qur’an*, 9 AL-TAWHID ISLAMIC J., <https://www.al-islam.org/print/book/export/html/21817>.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

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everything in its proper place, the returning of every right to its owner, and everyone obtaining his due.”¹⁰⁴

The Quran emphasizes protecting people from oppression, ensuring justice for weaker members of society, and determining right from wrong in complicated or uncertain disputes and issues.¹⁰⁵ This determination can only be realized through a judge with power to give legal verdicts in disputes.¹⁰⁶ God says through the Quran, “O David, indeed We have made you a successor upon the earth, so judge between the people in truth and do not follow [your own] desire.”¹⁰⁷ God commanded the Prophet to fairly judge between people.¹⁰⁸ God says, if you judge between people, judge between them with justice; definitely, God loves those who act justly and impartially.¹⁰⁹ It is important to note that the word of *Qaza* (justice) is mentioned repeatedly—in sixty places—which shows the importance of the judiciary in Islam, which God emphasizes fairly protects everyone’s rights.¹¹⁰

Additionally, in many Quranic verses, God reminds the Prophet that judges are required to judge fairly between people.¹¹¹ These verses then serve to remind judges of their responsibility in their prestigious positions. For example, God says, “Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice.”¹¹²

104. *Id.*

105. *Id.*

106. The Editorial Team of Dr. Abdurrahman Alal-Mal-u-ala, *The Judicial System in Islam*, ISLAMRELIGION.COM (Jan. 6, 2014), <http://www.islamreligion.com/articles/240/viewall/judicial-system-in-islam/>.

107. THE HOLY QURAN, *supra* note 97, 38:26.

108. *Id.* at 5:42.

109. *Id.*

110. *The word of Qaza in Quran*, ISLAMWEB.NET, <http://www.islamweb.net/ramadan/index.php?page=article&id=143930> (last visited Mar. 30, 2017) (trans. by Google).

111. THE HOLY QURAN, *supra* note 97, at 38:26.

112. *Id.* at 4:58.

*B. Hadiths Relevant to the Importance and
Role of Judges and the Judiciary*

Through the Quran and Hadith, the Prophet also explains the importance of the judge and judiciary in Islam. Many of the Prophet's Hadiths encourage judges while warning them of the dangers of failing to perform their obligations well and justly.¹¹³ In a Hadith, which is narrated from Ibn Omar about the encouragement of judges, the Prophet says, "If I am a judge for resolving disputes between two people, it is better to me than seventy years' worship."¹¹⁴

Explaining this Hadith, the Imam Ahmad, a leader of the school of jurisprudence, says that a judge is essential in society to give people their rights, and life would be worthless if there were no judiciary and dispute resolution.¹¹⁵ The Prophet trained his companions as judges and emphasized their duties and responsibilities.¹¹⁶ For example, the Prophet trained his companion Mu'adh ibn Jabal intending to send him to Yemen to serve as a judge.¹¹⁷ The following exchange exemplifies the Prophet's teaching about the role and manner of a judge.

The Prophet asked Mu'adh ibn Jabal what he would do if a matter were referred to him for judgment.¹¹⁸ Mu'adh said, "I shall judge in accordance with Allah's Book."¹¹⁹ The Prophet asked what he would do if he found no guidance in the Quran.¹²⁰ Mu'adh said, "[I shall act] in accordance with the Sunnah of the Messenger of Allah."¹²¹ The Prophet asked, "if you do not find the solution in the Sunnah of the Messenger?"¹²² Mu'adh said, "I shall do my best to form an opinion and I shall spare no effort."¹²³ Then the Prophet warned that judges are not allowed to be angry when they decide and resolve disputes between

113. ABDULLAH IBN ABDURRAHMAN RAHMAN BASSAM, TAYSIR AL-ALLAM SHARH 'UMDAT AL-AHKMAN 1003 (Mohammad Ibn Majqan ed., 2d ed. 2007).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Jami al Tirmidhi* 27:120.

118. *Sunan Abi Dawud* 25:22.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

people.¹²⁴ In a Hadith narrated by Abdurrahman ibn Abi Bakra, Abdurrahman reported to his son the Prophet and said, “A judge should not decide between the two while he is in anger.”¹²⁵

For the judge and judiciary to judge fairly between people, the Prophet separated judges into three categories.¹²⁶ The Hadith, narrated by ibn Buraida’s father and spoken by the Prophet Mohammad, discusses three types of judges in which one of them will go to Paradise and two of them will go to Hell.¹²⁷ The judge who goes to Paradise is a man who recognizes what is right and judges appropriately; but a man who knows what is right and acts unjustly in his judgment will go to Hell.¹²⁸ Likewise, a man who gives judgment for people while he is ignorant and unaware will go to Hell.¹²⁹

To conclude, many Hadiths described the importance and position of judges and importance of the judiciary in Islamic perspective. According to the Hadiths, a judge has the authority to interpret the laws in cases in which there is no explicit guidance in the Quran or the Hadiths. In addition, it is expected that a judge will decide justly with complete awareness of the facts of a case.

C. Historical Perspectives

The history of Islamic jurisprudence and the judiciary begins with the prophet Mohammad.¹³⁰ As a chief judge of dispute resolution in Islam, the Prophet ensured the accountability of the judiciary.¹³¹ Prior to the introduction of Islam, peoples of the Arabian Peninsula were nomadic tribes who worshiped idols.¹³² These tribes often fought

124. *Id.* at 25:19.

125. *Id.*

126. *Id.* at 25:3.

127. *Id.*

128. *Id.*

129. *Id.*

130. J. Schacht, *Law and Justice in* CAMBRIDGE ENCYCLOPEDIA OF ISLAM 539 (2d ed., 1985).

131. *Id.*

132. *The Origins of Islamic Law*, CONST. RTS. FOUND. (Apr. 3, 2017), <http://www.crf-usa.org/america-responds-to-terrorism/the-origins-of-islamic-law.html><http://www.crf-usa.org/america-responds-to-terrorism/the-origins-of-islamic-law.html>.

between themselves.¹³³ Their marriages, hospitality, and revenge, were governed by their own customs.¹³⁴ Crimes against persons were resolved through personal retribution or sometimes by an arbitrator.¹³⁵

The Prophet Mohammad introduced the Arabic world to Islam, which recognized only one true God and commanded that people obey God and his laws.¹³⁶ The Quran mandates fundamental standards of human conduct; however, the Quran does not provide a detailed code of law.¹³⁷ Legal matters only account for a limited number of verses. Mohammad devoted his life to explaining the law through Quran interpretations and judging legal cases.¹³⁸ In this way, Islamic law, or Shari'a, became part of the Muslim religion.¹³⁹

The sections below describe this history with the purpose of showing how current conceptions of the role of the judge, the judiciary, and a three-tiered judicial system are consistent with historical Islamic teaching and jurisdiction.

1. The Era of the Prophet and his Companions (610 – 661 A.D.)

When the prophet Mohammad came to Madinah, a city in Saudi Arabia, at the second year of *Hijrat* (migration) he signed and issued a charter named by Madinah's Charter.¹⁴⁰ He included that whoever is the participant of the charter, people who occupy Madinah, shall have disputes referred to Allah (God) and his prophet for resolution.¹⁴¹ With this statement, he became the first chief justice for Muslims and Jewish people in Madinah, in Islamic history.¹⁴² No evidence exists to suggest

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. MADDAH NORUDDIN, MUHADARAT HAWL ALNNIZAM ALQADAYIY FI AL'ISLAM [A LECTURE ON THE JUDICIAL SYSTEM IN ISLAM] 3.

141. *Id.*

142. *Id.*

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that the Prophet appointed anyone to review his decisions.¹⁴³ He alone resolved disputes and there are many examples of these cases in the Hadith.¹⁴⁴ In the Hadith, narrated by Abdullah ibn Masood, the Prophet reportedly said, “whoever takes an untrue oath, to take the property of a Muslim (illegally) will meet Allah while He will be angry with him.”¹⁴⁵ His companion Al-Ash’ath mentioned his story according to this Hadith and said the following:

By Allah, that saying concerned me. I had common land with a Jew, and the Jew later on denied my ownership, so I took him to the Prophet who asked me whether I had a proof of my ownership. When I replied in the negative, the Prophet asked the Jew to take an oath. I said, “O Allah’s Messenger! He will take an oath and deprive me of my property.” So, Allah revealed the following verse: “Verily! Those who purchase a little gain at the cost of Allah’s covenant and their oaths.”¹⁴⁶

This Hadith demonstrates Prophet Mohammad was capable of deciding cases. However, in some serious cases God notified him and challenged his decision.¹⁴⁷

Due to these accounts, some people may argue that the decision of the Prophet was final in dispute resolution.¹⁴⁸ The more appropriate view considers two characteristics of the Prophet’s rulings: he was a legislator guided by God and he had the responsibility of a chief justice.¹⁴⁹ In the first characteristic, the Prophet made no mistake or error.¹⁵⁰ If he had made mistakes, God would correct it.¹⁵¹ On the other hand, in the second characteristic, in which the Prophet performs the

143. See generally Tariq Mujahid, *Judgement at the time of prophet*, UNION LAW. LEGAL DEP’T (Aug. 20, 2012, 12:09 PM), <http://almostsharaltahkemy.dahek.net/t1452-topic> (trans. by Google).

144. See, e.g., Sahih al-Bukhari 44:7.

145. *Id.*

146. *Id.*

147. *Id.*

148. See generally Mujahid, *supra* note 143.

149. *Id.*

150. *Id.*

151. *Id.*

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job as a judge, he made mistakes—and after consulting with his companions who were not satisfied, he changed his decision.¹⁵²

For example, in the *Ghazwatu Khandaq* (Battle of trench), the Prophet decided to give half of the profit of certain dates to the tribe of Ghatfan because they did not participate in a fight with the Prophet.¹⁵³ Two of the Prophet's companions, Saad ibn Muadh and Sadan Saad ibn Ibadah, were not satisfied with this decision and asked the Prophet, “Is this your decision or is this God's decision?” The prophet replied, “This is my decision.”¹⁵⁴ Therefore, Saad ibn Muadh and Saad ibn Ibadah denied and rejected the decision of the Prophet Mohammad for giving half of the profit of Dates to the tribe of Ghatfan, tribe in Madinah. Prophet also accepted their decision.¹⁵⁵ This Hadith illustrates how the companions of the Prophet reviewed his decisions.

After the Prophet Mohammad's death, his companions ruled Arabia for approximately thirty years.¹⁵⁶ These political-religious rulers, called caliphs, continued to develop Islamic law with their own pronouncements and decisions.¹⁵⁷ Abu-Bakr, the first caliph, took territories outside Arabia, including modern-day Iraq, Syria, Palestine, Persia, and Egypt.¹⁵⁸ Accordingly, elements of Jewish, Greek, Roman, Persian, and Christian church law also influenced the development of the Shari'a at this time.¹⁵⁹

2. The Era of the Omayyad Caliphate (661 – 750 A.D.)

It is important to understand that the judicial system of the Omayyad Caliphate applied near the era of the Prophet.¹⁶⁰ Accordingly, it has a prestigious history from an Islamic perspective.¹⁶¹ The structure of the judiciary system in this era provided the foundation for the current three-tiered judiciary system.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *See The Origins of Islamic Law, supra* note 132.

157. *Id.*

158. *Id.*

159. *Id.*

160. MADDAH, *supra* note 140, at 8.

161. *Id.*

Islamic law developed along with the expansion of the Muslim Empire.¹⁶² When the caliphs of the Umayyad dynasty controlled the empire, they extended Islam into India, northwest Africa, and Spain.¹⁶³ The Umayyad hired Islamic judges to decide cases for dispute resolution involving Muslims.¹⁶⁴ The Umayyad's Caliphate had two rules for appointing a judge. The judge was to be appointed by either the caliph himself, if hired in the capital of the caliphate, or by a governor if he was hired in the area or provinces.¹⁶⁵ During the Umayyad period, provincial or city governors appointed the majority of judges.¹⁶⁶ Judges were required to be familiar with the Quran and the teachings of Mohammad.¹⁶⁷ These judges had the authority to decide cases in all areas of the law; however, non-Muslims kept their own legal system.¹⁶⁸ In the era of the Umayyad period, judges did not adhere to a specific jurisprudential opinion or the four schools of Fiqh—Hanafi, Shafii, Maliki, and Hanbali—because these four schools had not yet appeared.¹⁶⁹

During the Umayyad caliphate, judges decided cases in mosques or in their houses.¹⁷⁰ At that time, a register of cases began to develop.¹⁷¹ In addition, judges began ordering a scribe to record the testimony of witnesses.¹⁷²

162. *The Origins of Islamic Law*, *supra* note 132.

163. *Id.*

164. *Id.*

165. *The Judiciary in the Era of the Umayyad Caliphate*, COMPREHENSIVE SITE ENCYCLOPEDIA RES. SCH. CHAMEL (Oct. 24, 2014), http://bohouti.blogspot.com/2014/10/blog-post_902.html.

166. Mathieu Tillier, Judicial Authority and Qādīs' Autonomy under the Abbasids, 26 AL-MASAQ 2 (Aug. 25, 2014), <https://halshs.archives-ouvertes.fr/halshs-01057979/document>.

167. *Id.* at 8.

168. *The Origins of Islamic Law*, *supra* note 132.

169. MADDAH, *supra* note 140, at 3.

170. See *The Judiciary in the Era of the Umayyad Caliphate*, *supra* note 165.

171. *Id.*

172. *Id.*

3. *The Era of the Abbasside Caliphate (750 – 1258 A.D.)*

The Abbasid Caliphate dynasty began after the Umayyad's Caliphate.¹⁷³ When the Umayyad dynasty was overthrown in 750 A.D., it was replaced by the Abbasid dynasty.¹⁷⁴ The rule of Shari'a law fully developed during the 500-year rule of the Abbasids.¹⁷⁵ Under the absolute rule of Abbasid, control over substantial areas of criminal law were transferred from the judges to the government.¹⁷⁶ Judges handled cases related to religion, family, property, and commercial law.¹⁷⁷ The Abbasid Caliphs encouraged legal scholars to debate Shari'a law.¹⁷⁸

The second distinguishing aspect is that *Ijtihad* prospered.¹⁷⁹ *Ijtihad* technically means juridical struggle and competence to infer expert legal rulings from foundational proofs within or without reference to one of the four schools of law.¹⁸⁰ It explains the process of making a legal decision by independently interpreting legal sources, such as the Quran and Hadith, as technical expressions of Islamic law.¹⁸¹ Prior to and during the Abbasid caliphate, judges were what is referred to as *Mujtahid*.¹⁸² A *Mujtahid* is an individual qualified to practice *Ijtihad*.¹⁸³ At this time, four well-known Imams appeared, as did their schools of law and classified books of Fiqh.¹⁸⁴

A third differentiating factor between these two Caliphate periods was the establishment of a position of chief justice, a position that resembled today's Minister of Justice. Noruddin Maddah explains the

173. *The Origins of Islamic Law*, *supra* note 132.

174. *Id.*

175. *Id.*

176. Raja Petra Kamarudin & Masterwordsmith, *What is Meant by Hudud?*, MALAYSIA TODAY (Sept. 23, 2011), <http://www.malaysia-today.net/what-is-meant-by-hudud/>.

177. *Id.*

178. *Id.*

179. MADDAH, *supra* note 140, at 10.

180. *What is a "Mujtahid"? What does "Ijtihad" Mean?*, IDEAL MUSLMAH, <http://idealmuslimah.com/islamic-sciences/fiqh/148-introduction-to-fiqh/867-what-is-a-qmujtahidq-what-does-qijtihaadq-mean> (last visited Apr. 9, 2017).

181. *Id.*

182. MADDAH, *supra* note 140, at 9.

183. *What is a "Mujtahid"? What does "Ijtihad" Mean?*, *supra* note 180.

184. MADDAH, *supra* note 140, at 9–10.

difference in his article, “Muhadarat hawl Alnnizam Alqadayiy fi al’islam.”¹⁸⁵ The first chief judge, Abu Yusuf, was responsible for the judiciary and a student of the great Imam Abu Haneefa.¹⁸⁶ He notably began the tradition of judges wearing distinctive clothing.¹⁸⁷ Finally, the Abbasids Caliphate expanded the jurisdiction of judges and the judiciary, which was not significantly expanded during the era of Umayyad.¹⁸⁸ This jurisdiction expanded to include both civil and criminal cases, endowments, and personal status cases.¹⁸⁹

Many *Ulama* jurists refused to accept the position of judge in the time of Abbasids because they feared they would be unable to carry out the responsibilities of the office or that their rulings would be affected by politics and influential people.¹⁹⁰ They also worried participating in the judiciary would be contrary to the provisions of Shari’a.¹⁹¹

In conclusion, the judiciary developed further in the era of the Abbasids. This era can be distinguished from the Umayyad Caliphate for the way it expanded the role of the judiciary and judges, among other changes. However, there is no clear evidence showing parties were able to appeal to the highest court.

D. General Purpose of the Three-Tiered System (Reviewability)

The availability of new material facts—which failed to appear in time for trial but may appear at the appellate tier—provides one of the main rationales for a system of judicial review like the one in Afghanistan.¹⁹² Although judges try to correctly decide a case, there is

185. *Id.* at 47.

186. MOHAMMAD RAFAT ALUSMAN, KITAB ALNNIZAM ALQADAYIY FI ALFAQIH AL’ISLAM [THE BOOK OF JUDICIARY SYSTEM IN ISLAMIC FIQH] 47–48, 1415 (1994).

187. *Id.*

188. *Id.*

189. MADDAH, *supra* note 140, at 9–10.

190. *Id.*

191. *Id.*

192. See Robert J. Smith, *Recalibrating Constitutional Innocence Protection*, 87 WASH. L. REV. 139, 146 (2012); Lissa Griffin, *Correcting Injustice: Studying How the United Kingdom and the United States Review Claims of Innocence*, 41 U. TOL. L. REV. 107, 114 (2009).

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a possibility they may be incorrect.¹⁹³ In light of these observations, the three-tiered system helps effect justice.

Islamic scholarship develops and supports the justification for three-tiered judicial system. For example, in his book “Justice in Islam,” Abdulrahman bin Mualla observes a judge in serving his function, needs a group of collaborator judges to help reach decisions to fairly perform his job.¹⁹⁴ These collaborators should be a group of scholars available to consult him in cases where he will apply the provisions of Shari’a.¹⁹⁵

Notably, Abdullah ibn Abas and Ali ibn Abutaleb, companions of the Prophet, were the collaborators to the third Caliph Umar ibn Khatab, whom they assisted to reach decisions.¹⁹⁶ The purpose of this consultation was to ensure the judge did not forget or make a mistake regarding key facts of a case, which in turn would impact the judge’s ability to make a just decision.¹⁹⁷

The Prophet also said, “I am a human being and my decision would be based on what you have presented of evidence according to a case.”¹⁹⁸ Although he was the Prophet, he informed and warned people who might make mistakes in cases, and involved parties to the cases, who were familiar with the facts of the case.¹⁹⁹

According to one Hadith narrated by Umm Salama—the wife of the Prophet—the Prophet Mohammad reportedly said, “You bring to me for (judgment) your disputes, some of you perhaps being more eloquent in their plea than others, so I give judgment on their behalf according to what I hear from them.”²⁰⁰ The Prophet also said, “(Bear in mind, in my judgment) if I slice off anything for him from the right of his brother, he should not accept that, for I sliced off for him a portion from the Hell.”²⁰¹

193. *Sahih Muslim* 30:18.

194. *See id.*

195. *See id.*

196. *Id.*

197. *Id.*

198. AL-QUSHAIRE, MUSLIM BIN HAJAJ, *SAHIH MUSLIM* 1337 (1991).

199. *Id.*

200. *Sahih Muslim* 30:4

201. *Id.*

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Recently, in all countries that are both Islamic and democratic, including Afghanistan, a three-tiered judiciary system has developed.²⁰² For the sake of fairness and justice, parties to litigation have the right to review a first court's decision by way of appeal (trial, intermediate appeal, and highest appeal).²⁰³ Under the Law on Organization and Jurisdiction of Courts of the Islamic Republic of Afghanistan, the stated purpose of the establishment of an appellate court is to supervise the rulings and decisions of the lower courts and review the legal process as a whole.²⁰⁴ Under this law, an appellate court may correct, overturn, amend, confirm, or repeal the lower court's ruling and decision.²⁰⁵ Similarly, Article 17 of the Law of the Judiciary of Saudi Arabia states the creation of the appellate court is to "review appealable judgments rendered by first instance courts and shall decide, after hearing the statements of litigants, in accordance with the procedures provided for in the Law of procedure before Shari'a Courts and the Law of Criminal procedure."²⁰⁶

In conclusion, a human judge is not without fault, and mistakes may arise in their decisions. Even the Prophet made mistakes, which were corrected by God. In acknowledging the possibility of new evidence and human error, the three-tiered judicial system presents the best response and the best way to review a judge's decision.

III. THE THREE-TIERED JUDICIAL SYSTEM OF CONTEMPORARY SAUDI ARABIA

Similar to the Constitution of Afghanistan, the "Basic Law of Governance" of contemporary Saudi Arabia also has a clause clarifying the role of Islam in Saudi Arabian governance.²⁰⁷ Specifically, the Saudi provision explains, "[T]he Kingdom of Saudi Arabia is a fully sovereign Arab Islamic state. Its religion shall be Islam and its

202. ALGHAMIDY, *supra* note 39, at 151.

203. *See generally* LAW ON ORGANIZATION AND JURISDICTION OF JUDICIARY, *supra* note 61, art. 5.

204. *Id.* art. 33 § 2.

205. *Id.*

206. LAW OF THE JUDICIARY OF SAUDI ARABIA art. 17 [hereinafter LAW OF THE JUDICIARY OF SAUDI].

207. ALNNIZAM AL'ASASI LILHKM [BASIC LAW OF GOVERNANCE] art. 1 (trans. by Google) [hereinafter BASIC LAW OF SAUDI].

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constitution shall be the Book of God and Sunnah (Tradition) of His Messenger.”²⁰⁸

Similar to Afghanistan, Saudi Arabia also established separation of powers under Article 44 of the Basic Law of Governance: Judicial Authority, Executive Authority, and Regulatory (legislative) Authority.²⁰⁹ Emphasizing the independence of the judiciary, Article 46 clearly states, “[T]he Judiciary shall be an independent authority. There shall be no power over judges in their judicial function other than the power of the Islamic Shari’a.”²¹⁰ In this way, Saudi Arabia offers a strong example of an Islamic government that follows the strict mandate to be guided by Shari’a, while justifying a three-tiered judicial system under the same mandate.²¹¹ The next section describes the structure and function of the judiciary in Saudi Arabia, as well as the arguments Saudi Arabian scholars use to justify their three-tiered judicial system.

A. Three-Tiered Courts

Saudi Arabian ties to Islam are both deep and ancient.²¹² In fact, the Prophet Mohammad began the first invitation to Islam in this region of the world.²¹³ Consistent with this history, Article 1 of the Basic Law of Governance of Saudi Arabia establishes the country as an Islamic kingdom and state.²¹⁴

Saudi Arabia’s three-tiered judiciary system is described in Article 9 in the Law of Judiciary.²¹⁵ The law states, “[T]he courts shall consist

208. *Id.*

209. *Id.* art. 44.

210. *Id.* art. 46.

211. *See generally Saudi Arabia – Justice*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Saudi-Arabia/Government-and-society#ref45217> (last visited Jan. 18, 2018).

212. *See generally Saudi Arabia – Religion*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Saudi-Arabia/Religion> (last visited Jan. 18, 2018).

213. BASIC LAW OF GOVERNANCE, *supra* note 207, art. 1.

214. *Id.*

215. *See generally* LAW OF THE JUDICIARY OF SAUDI ARABIA, *supra* note 206, art. 9.

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of the following: (1) the Supreme Court, (2) Courts of Appeal, and (3) First Instance Courts.”²¹⁶

As needed, Saudi Arabia established the first trial courts in the provinces, counties, and districts.²¹⁷ To review the decisions of these first trial courts, Saudi Arabia also established Courts of Appeal, which “shall review appealable judgments rendered by first instance courts and shall decide, after hearing the statements of litigants, in accordance with the procedures provided for the Law of Procedure before Shari’a Courts and Law of Criminal Procedure.”²¹⁸ Finally, the Saudi government established one Supreme Court to review the decisions of the Courts of Appeal. The purpose of the Supreme Court is to “[r]eview appealable judgments and decisions issued or supported by courts of appeals,”²¹⁹ and to look for “[v]iolations of the provisions of Shari’a or Laws issued by the King which are not inconsistent with Shari’a,”²²⁰ and the “[r]endering of a judgment by a court improperly constituted”²²¹

It is worth mentioning that judges in Saudi Arabia must obtain a Shari’a law degree or must obtain an equivalent degree and pass a special examination.²²² Article 31 of the Judiciary Law indicates, judges “shall be fully competent to hold the position of a judge in accordance with Shari’a.”²²³

B. Saudi Arabian Perspective and Islamic Justification for a Three-Tiered Judiciary

From an Islamic perspective, a three-tiered judiciary has a holy purpose: to ensure the decisions of first-tiered courts were fair.²²⁴ For this purpose, Islamic jurisprudence has recognized that a court should be arranged on different tiers and stages.²²⁵ This means certain courts

216. *Id.*

217. *Id.* art. 18.

218. *Id.* art. 17.

219. *Id.* art. 11 § 1.

220. *Id.* art. 11 § 2(a).

221. *Id.* art. 11 § 2(b).

222. *Id.* art. 31.

223. *Id.*

224. ALGHAMIDY, *supra* note 39, at 151–52.

225. *Id.*

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and judges should be higher than others.²²⁶ Under this structure, parties have the right to appeal the first court's decision to a higher court who will confirm, overturn, or remand it.²²⁷ There are four justifications recognized for this three-tiered system.²²⁸ Saudi scholars view this three-tiered system as accepted under the Islamic Fiqh.²²⁹ They also articulate justifications for this system based on the Quran and Sunnah.²³⁰

The first justification concerns the provision from the Quran in Surat Ar-Ra'd (the thunder), in which God (Allah) says, "Have they not seen that We set upon the land, reducing it from its borders? And Allah decides; there is no adjuster of His decision. And He is swift in account."²³¹ A Saudi jurist named *Ulama* applied the rule of *Mafum al-mukhalafah* (divergent meaning), to this verse to show that it is impossible to adjust a ruling of God.²³² However, for other decisions, such as a judgment from a first-tiered court, there must be something capable of reviewing decisions and testing accuracy.²³³

The second justification stems from a case, which is described at Surat Al-Anbya (the Prophet). In Surat Al-Anbya, two different verses explain that God says, "And [mention] David and Solomon, when they judged concerning the field—when the sheep of a people overran it [at night], and We were witness to their judgment."²³⁴ God also says, "And We gave understanding of the case to Solomon, and to each [of them] We gave judgment and knowledge. And We subjected the mountains to exalt [Us], along with David and the birds. And We were doing [that]."²³⁵ These verses from the Holy Quran are used by Saudi Arabian religious scholars to justify the three-tiered judicial system.²³⁶ In doing so, they assert that the Surat Al-Anbya case shows that the parties to the

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 151.

230. *Id.*

231. THE HOLY QURAN, *supra* note 97, at 13:41.

232. ALGHAMIDY, *supra* note 39, at 151–52.

233. *Id.*

234. THE HOLY QURAN, *supra* note 97, at 21:78.

235. *Id.* at 21:79.

236. ALGHAMIDY, *supra* note 39, at 152.

litigation appealed to Solomon because they were not satisfied with David's decision.²³⁷

The case discussed in this verse can be summarized as follows. A ship of one people caused damage to a garden when attempting to steal it.²³⁸ The owners of the destroyed garden went to David, a Prophet of God.²³⁹ David ruled that the owners of the garden should receive the ship as compensation.²⁴⁰ Although the shipper originally accepted David's decision, they expressed their dissatisfaction with Solomon.²⁴¹ Solomon, the son of David, asked them, "How did David the Prophet of God rule and decided in your case?" They answered, "He gave the ship to the owner of the garden as a compensation."²⁴² Solomon replied, "Perhaps the just ruling is different; come with me."²⁴³

Solomon went to his father and said, "Oh Prophet of God you ruled and decided this and that [this is an expression in Arabic to explain the case] and I realize what is more merciful to everyone."²⁴⁴ David said, "And what is it?" Solomon responded, "Give the ship to the owner of the garden, so that he benefits from their milk, butter, and wool. And give the garden to the shipper, so that he takes care of it. And when the garden gets back to its original states and the next year each one of them will return the property to the other."²⁴⁵ David stated, "May Allah bless you." This shows how Solomon changed David's decision and provided a form of judicial review.²⁴⁶

The third justification for judicial review stems from the Hadith of the Prophet.²⁴⁷ Imam Bukhari, considered Imam, wrote a book considered as a reliable source after the Quran. In this book, Abu Huraira the Prophet said:

237. *Id.*

238. IBN KASEER & ISMAEL IBN AMAR ALDAMISHQI, TAFSEER LA'QURAN ALAZIM [INTERPRETATION OF THE QURAN] 355 (2d ed. 1999) (on file with author) [hereinafter IBN KASEER].

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Sahih al-Bukhari* 85:45.

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There were two women with whom there were their two sons. A wolf came and took away the son of one of them. That lady said to her companion, "The wolf has taken your son." The other said, "But it has taken your son." So, both of them sought the judgment of (the Prophet) David, who judged that the boy should be given to the older lady. Then both of them went to (the Prophet) Solomon, son of David, and informed him of the case. Solomon said, "Give me a knife so that I may cut the child into two portions and give one half to each of you." The younger lady said, "Do not do so; may Allah bless you! He is her child." On that, he gave the child to the younger lady. Abu Huraira added: "By Allah! I had never heard the word 'Sakkin' as meaning knife, except on that day, for we used to call it 'Mudya.'"²⁴⁸

The *Ulama* note from this verse explains Solomon intervened and changed David's decision because he knew the parties were not satisfied.²⁴⁹ He then sent the case back to David, who provided a different ruling that was more fair and just.²⁵⁰

Many Muslim jurists agree that the laws of those who came before us—known in Arabic as *Sharayie min Qablin* and created by Jesus, David, and Solomon—should be upheld if they have the three following qualities: (1) they are accurately transmitted to us in the Quran or the Sunnah;²⁵¹ (2) they are supported by Islamic law;²⁵² and (3) they are not contradicted by Islamic law.²⁵³ These conditions are met in the previous two cases because they have been transmitted through the Quran and the Sunnah, and Islamic law supported them.²⁵⁴

The fourth justification derives from the case of Al-Zabia. In Al-Zabia, Ali ibn Abi Talib, a companion of the Prophet Mohammad, acted as judge.²⁵⁵ In this case there were some people that dug a well in

248. *Id.*

249. ALGHAMIDY, *supra* note 39, at 153–54.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. Al-Haythami Ali bin Abi Bakr bin Suleiman, *Majmae alzzawayid wamanabae alfawayid* [COMPOUND OF BENEFITS AND SOURCE OF INTEREST], AL-EMAN, <http://www.al-eman.com/> (enter title of article into search bar) (last visited Dec. 7, 2017) (trans. by Google).

Yemen.²⁵⁶ One man fell into the well.²⁵⁷ He pulled in another man, and that man pulled in a third man, and the third man pulled in a fourth.²⁵⁸ All of the men died.²⁵⁹

The families came to Ali ibn Abi Talib, who was appointed as a judge in Yemen by the Prophet Mohammad.²⁶⁰ He said, “Gather all who dug the well.”²⁶¹ He awarded the first man’s family a quarter of a *Diya*—a *Diya* represents money traditionally acquired when a life is taken²⁶²—because this first man’s actions caused the death of the three others.²⁶³ Ali ibn Abi Talib gave the second man’s family one a third of the *Diya* because the second man caused the death of two, and gave the third man’s family a half *Diya* because the third man caused the death of one.²⁶⁴ Finally, Ali ibn Abi Talib gave the fourth man’s family a full *Diya* because the fourth man was not responsible for any man’s death.²⁶⁵

The following year, the families were unsatisfied with Ali’s decision and went to the Prophet Mohammad while he was in Maqam Ibrahim, the Holy masque in Macca.²⁶⁶ Again, when they told him the story, the Prophet Mohammad confirmed Ali’s decision.²⁶⁷

Because the families successfully appealed the decision to the Prophet, this Hadith shows that the Prophet Mohammad reviewed the facts of a case that had already been decided by his appointed Judge Ali ibn Abi Talib.²⁶⁸ Ulama of Saudi argued this review confirms Islam’s allowance of re-litigating issues to a higher judicial power.²⁶⁹ The

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Diya*, AL-MAANY, <https://www.almaany.com/en/dict/ar-en/%D8%A7%D9%84%D8%AF%D9%8A%D8%A9/> (last visited Apr. 22, 2017).

263. *See* Suleiman, *supra* note 255.

264. *See id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. ALGHAMIDY, *supra* note 39, at 154–55.

269. *Id.*

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combined evidence gives strong support to the permissibility and legitimacy of different tiers of litigation.²⁷⁰

In light of these Hadiths, we see foundation and justification for at least two types of courts: (1) courts of first instance (original jurisdiction) or primary courts that hear litigation, disputes, and cases, and issue rulings,²⁷¹ and (2) a highest court or supreme court.²⁷² The highest court oversees judicial proceedings and fairness of judicial decisions in order to decide whether rulings conform to constitutional rights and Shari'a, whichever is considered accurate according to the two principles (constitutional rights and Shari'a) is confirmed and vice versa.²⁷³

The wisdom of Islamic jurisprudence allowing different tiers of litigation comports with Islam as a religion of justice.²⁷⁴ Islamic jurisprudence gives parties the right to seek several reviews of judgment through appeal to the highest court.²⁷⁵ Additionally, Allah and his Prophet ordered justice in several verses and Hadiths.²⁷⁶ Moreover, re-litigating and appealing the case to the highest court creates a chance to present additional evidence and arguments.²⁷⁷

This Article argues, as in the cases described above (Ali's decision reviewed by the Prophet Mohammad, and the decision of David reviewed by Solomon), judicial review results in better outcomes, justice, fairness, and increases the possibility of reaching a more legitimate judgment.²⁷⁸ Furthermore, most cases are based on *Ijtihad* and analogy, and these illustrations show that the judge is a human being, and human beings are fallible.²⁷⁹ Therefore, a judge can make mistakes in deciding a case, and that possibility necessitates a process

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

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of affording a second look in hopes of reassuring parties and achieving a just result.²⁸⁰

C. Lessons Learned for Afghanistan

The controversy over a three-tiered Islamic judiciary is significant because a poorly formed judiciary may cause instability in the court system by calling into question the legitimacy of the Constitution and the general system of justice.²⁸¹ To ensure stability and prevent opposition parties, like the Taliban, from dismantling the current system, it is essential to show prominent Afghan Islamic scholars and Afghan people that cases described in the Quran and the Hadiths allow for the 2004 Constitution and the three-tiered judicial system. Well-established Islamic countries like Saudi Arabia provide great examples.

IV. JUSTIFICATION FOR THE AFGHAN THREE-TIERED JUDICIARY OF TODAY

As this Article suggests, the current three-tiered judicial system of Afghanistan is compatible with Islam.²⁸² Indeed, contemporary scholars have found this compatibility through various verses of the Quran and Hadiths of the Prophet.²⁸³ This section explains that Afghan scholars look to Saudi Arabia's justifications for its three-tiered judicial system to justify its consistency with Islamic law.

A. Argument for the Saudi Approach and Why It Makes Sense in the Afghan Context

As an Islamic state, the Afghan judiciary applies legal principles articulated in Shari'a law, the Afghanistan Constitution, statutes, codes, and regulations passed by the other branches of government. Afghanistan's commitment to Islam is illustrated by the language of Article 130 of the Constitution, which as previously explained, calls

280. *Id.*

281. *See generally Importance of the Judicial Branch*, THE JUD. BRANCH, <https://beckerjudicial.weebly.com/importance-of-the-judicial-branch.html>, (last visited Nov. 11, 2017).

282. ALGHAMIDY, *supra* note 39, at 151.

283. *Id.*

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upon courts to apply Hanafi jurisprudence to fill in the gaps when there is no other guidance of law.²⁸⁴ Consistent with this provision of the Constitution, Afghan judges follow Hanafi jurisprudence and its provision— especially in civil cases.²⁸⁵ These four-jurisprudential schools and their four Imams emerged during Abbasside caliphate and through *Ijtihad*.²⁸⁶ The four Imams infer different *Masayil* (issues) from words based on their knowledge and interpret those that have ambiguities.²⁸⁷ In Arabic, one can deduce many meanings from text.²⁸⁸ Accordingly, the Imams have some disagreement over sub-matters.²⁸⁹

Contemporary Saudi Arabian scholars apply the rule of *Mafum al-mukhalafah* (divergent meaning), to justify the three-tiered court system in Islamic law.²⁹⁰ In fact, a majority of Muslim scholars believe that *Mafum al-mukhalafah* is one of the factors to consider when seeking proof in Shari'a law.²⁹¹ Therefore, Saudi scholars applied this rule, and argued that although the decisions of God are perfect and unreviewable, men are not infallible and should be subject to review.²⁹² In the Afghan context, this first justification will not work. Although *Majum al-mukhalafah* is acceptable for other three Imams, in Hanafi jurisprudence *Mafum al-mukhalafah* is not acceptable.²⁹³ Therefore, the first verse could not be applied for the consistency of the Afghan three-tiered judiciary system.

Saudi scholars' second justification stems from *Shariea min Qablina*, which is acceptable by having some qualities. The Quranic verse, which Prophet David decided, and Hadith, narrated by Abu

284. DA AFGHANISTAN ASSASI QANOON [CONSTITUTION] Jan. 26, 2004, art. 130.

285. CIVIL CODE OF AFGHANISTAN art. 1 § 2.

286. MADDAH, *supra* note 140, at 9–10.

287. *The Difference of Scholars' Opinions on the Sub-Matters on the Jurisprudence and Science, not Ignorance and Passion*, ISLAMICWEB.NET, <http://fatwa.islamweb.net/fatwa/index.php?page=showfatwa&Option=Fatwald&Id=6787> (last visited Nov. 11, 2017) (trans. by Google).

288. *See generally id.*

289. *Id.*

290. ALGHAMIDY, *supra* note 39, at 151.

291. *Id.*

292. *Id.*

293. M. H. KAMALI, ABBREVIATIONS OF PRINCIPLES OF ISLAMIC JURISPRUDENCE 114–21 (2006).

Huraira, both emanate from *Shariea min Qablina*.²⁹⁴ All of these conditions are met in the previous two cases.²⁹⁵ Thus, the *Ulama* used these cases for consistency of a three-tiered judicial system.²⁹⁶ This justification would be acceptable in Afghanistan as it stems from Hanafi jurisprudence and would be consistent with Article 3 of the Constitution.

Finally, the last Hadith, in which Ali ibn Abi Talib was the decider, illustrates a decision review process best responds to the needs of society.²⁹⁷ Therefore, when the people of Yemen came to the Prophet and he considered the facts of case, he decided that Ali fairly judged the case and confirmed Ali's decision.²⁹⁸ Since Afghanistan is a Muslim nation and follows the Hadith and the words of the Prophet, advocating for an appellate judicial system is justified.

Review by a higher court promotes fairness because potential exists for the discovery of new facts at the appellate level, which did not appear in the trial level. Additionally, judges are human and can never be completely without fault. Therefore, the three-tiered system is the best way to respond to this dilemma and ensure justice. Even the Prophet said, "I am only a human being, and you bring your disputes to me . . . so that I give judgment on their behalf according to what I hear from them."²⁹⁹ So, the establishment of an appeals court has a sanctified goal and purpose, which is to correct, overturn, amend, confirm, or repeal the ruling and decision of the lower courts after hearing both parties' statements.³⁰⁰

B. Critics and Opposition

Critics oppose the three-tiered judiciary based on the reasoning that Allah is the ultimate judge and cannot be reversed.³⁰¹ However, the scholarly *Ulama* found justifications for the three-tiered judiciary by

294. ALGHAMIDY, *supra* note 39, at 153–54.

295. *Id.*

296. *Id.*

297. Suleiman, *supra* note 255.

298. *Id.*

299. *Sunan Abi Dawud* 25:13.

300. See generally LAW ON ORGANIZATION AND JURISDICTION OF JUDICIARY, *supra* note 61, art. 54.

301. THE HOLY QURAN, *supra* note 97, at 13:40.

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making inferences and interpreting the Holy Quran.³⁰² These same *Ulama* have determined the existence of the three-tiered judiciary system at the time of the prophet and acknowledged appealing by parties who were not satisfied with the judgement of Ali ibn Abi Talib to the Prophet.

Islamic jurists recognize over time some rules and provisions of Islam have changed and continue to change.³⁰³ The prominent contemporary Imam Mohammad Taqi Usmani, in his book *Principles of Issuing Fatwas Aswl al'iifta' wadabuhu*, mentioned four conditions that can give rise to changes in the rules of Islam.³⁰⁴

The first condition occurs when there is a close connection and relation between the *hukum* and *ellat* (cause).³⁰⁵ Whatever changes *ellat* by changing of *zaman* (time), automatically changes the *hukum*.³⁰⁶ The second condition occurs when the rule is based on custom and culture of the society.³⁰⁷ Thus, as the customs and culture of society change, so do the rules.³⁰⁸ The third condition is that a vital necessity can lead to a change in the rules.³⁰⁹ Fourth, the Imam, Mohammad Taqi Usmani, says the rule or provision in Islam might be changed for *Sadd Aldhharayie*, the prohibition of what may lead to committing sins.³¹⁰ When new behaviors arise that should be considered sinful, a new rule may arise to address it.³¹¹

Among these four conditions, the occurrence of which is necessary to change rules in Islam, two can be applied to justify the three-tiered court judiciary system. First, the customs of the society have changed.³¹² The Prophet era lived in the best generation.³¹³ In contrast, this era, in which we are living in, is not the best century. While it may

302. KAMALI, *supra* note 293.

303. MUHAMMAD TAQI USMANI, ASWL AL'IIFTA' WADABUHU [PRINCIPLES OF ISSUING FATWAS] 240–41 (2011).

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.* at 240.

309. *See id.*

310. *Id.*

311. USMANI, *supra* note 303, at 240.

312. *Id.*

313. *Sahih al-Bukhari* 52:16.

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have been possible to avoid appeals in the era of the Prophet, today's judges and litigants need the process of judicial review to protect peoples' rights.

Finally, one of the reasons the three-tiered court system can be justified derives from *Sadd Aldhharayie*, which has the greatest likelihood of reducing corruption in the judiciary system—an Islamic sin.³¹⁴ For example, giving a bribe for quick processing of a case or reducing of punishment is prohibited in Islam.³¹⁵ The Prophet Mohammad “cursed the one who bribes and the one who takes a bribe for a judgment.”³¹⁶

CONCLUSION

Whether a country adheres to civil law, common law, or mixed law, most have a three-tiered judiciary system. Afghanistan operates under a mixed Islamic and civil law legal system and a three-tiered judiciary system. Although some Afghan Islamic scholars question whether this three-tiered judicial system is consistent with provisions of *Shari'a*, this Article responds that the three-tiered judiciary has a long-standing history in Islamic jurisprudence and is consistent with provisions of Islam. Islamic jurists allowed and found justification based on the Quran and Hadith of the Prophet Mohammad. Therefore, the Constitution of Afghanistan identified there shall be no law that contradicts any provision of Holy Islam and identified the judiciary—with its three-tiered court system—as an independent branch of government. Undoubtedly, the Afghan three-tiered judicial system is consistent with the provisions of Holy Islam.

314. USMANI, *supra* note 303, at 240–41.

315. *Sunan Abi Dawud* 25:10.

316. *Jami at-Tirmidhi* 15:16.